INTERIOR BOARD OF INDIAN APPEALS

Stanley and Greta Elmore v. Muskogee Area Director, Bureau of Indian Affairs

21 IBIA 242 (03/17/1992)

United States Department of the Interior

STANLEY and GLETA ELMORE,   :   Order Docketing and Dismissing
         Appellants   :   Appeal
                                         :
        v.   :
                                         :   Docket No. IBIA 92-132-A
MUSKOGEE AREA DIRECTOR,   :
   BUREAU OF INDIAN AFFAIRS,   :
         Appellee   :   March 17, 1992

By letter dated October 21, 1991, appellants Stanley and Gleta Elmore were informed that the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), had assessed an additional royalty under appellants' Osage oil and gas lease number 993. The Area Director issued approximately 545 such notices of additional royalty on October 21, 1991. Each letter informed the lessee:

> This decision may be appealed to the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340. Your notice of appeal to the Board must be signed by you or your attorney, and must be mailed within thirty days of the effective date of this decision (15 days from the date of this letter). * * * You must send copies of your notice of appeal to (1) the Assistant Secretary-Indian Affairs * * *, (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures.

> If no appeal is timely filed this decision will be final for the Department of the Interior at the expiration of the appeal period * * *. No extension of time may be granted for filing a notice of appeal.

The Board did not receive a notice of appeal from appellant. It first became aware that appellant had attempted to file an appeal when it received a letter from appellants, dated March 6, 1992, "restating (their) intention to appeal any additional royalty levied on October 21, 1991." From the information enclosed with appellants' letter, it appears that their notice of appeal was addressed to the Assistant Secretary - Indian Affairs.

43 CFR 4.332(a) provides that a notice of appeal from the decision of a BIA Area Director must be filed with the Board, and that an untimely notice of appeal must be dismissed. This information was also provided to appellant in the Area Director's decision. Both the regulations and the Area

Director's decision gave appellant the Board's correct mailing address. There is no indication that the notice of appeal was properly filed with the Board.

The Board has accepted untimely notices of appeal when the untimeliness is the result of incorrect information given to the appellant by BIA. See, e.g., Lovelock Paiute Tribe v. Acting Phoenix Area Director, 18 IBIA 249 (1990); Washoe Tribe v. Phoenix Area Director, 18 IBIA 192, 193 n.1 (1990). Cf. 25 CFR 2.13(c): "Notwithstanding any other provision of this section, an official deciding an appeal shall allow late filing of a misdirected document, including a notice of appeal, where the official finds that the misdirection is the fault of the government."

However, when BIA gives correct instructions for filing a notice of appeal, and an appellant's failure to follow those instructions results in an untimely appeal to the Board, there is no way the mandate in 43 CFR 4.332 (a) may be avoided. The Board is required by that section to dismiss an untimely notice of appeal. McLean v. Portland Area Director, 18 IBIA 311 (1990); Jones v. Assistant Anadarko Area Director, 17 IBIA 122 (1989).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Muskogee Area Director's October 21, 1991, decision is docketed and dismissed as not being timely filed.

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Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge

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